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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1969

No. [redacted] 204

JEWEL W. JORDAN,

Appellant,

v.

STATE OF ARIZONA, Ex Rel.
GARY K. NELSON
The Attorney General,

Appellee.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT OF MOTION

On Appeal from the
Supreme Court of Arizona

GARY K. NELSON
Attorney General of Arizona
Rm. 159 State Capitol Bldg.
Phoenix, Arizona 85007

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MOTION TO DISMISS
AND BRIEF IN SUPPORT OF MOTION

COMES now the appellee herein, by and through the Attorney General of Arizona, GARY K. NELSON, pursuant to Rule 16, Rules of the Supreme Court, 28 U.S.C., and moves this Court to dismiss the appeal heretofore filed in this cause for the following grounds:

1. This cause does not present to the Court a substantial federal question.

2. The federal question sought to be reviewed here was not timely raised in the court below.

3. The decision of the Supreme Court of the State of Arizona clearly rests on an adequate non-federal basis.

OPINIONS BELOW

The opinions below are fully and accurately set out as Appendices A and B of appellant's jurisdictional statement herein. The full citation to the decision is: State Ex Rel. Nelson v. Jordan, 104 Ariz. 90, 449 P.2d 18 (1968), on rehearing, 104 Ariz. 193, 450 P.2d 383 (1969).

STATEMENT OF THE CASE

Appellant, in her jurisdictional statement, pages 3 to 24, has presented, interspersed with mixed statements of fact and law and argument, a relatively accurate portrayal of the factual matters leading up to this appeal. For purposes of this motion, appellee accepts the factual material set out by appellant and, for the convenience of the Court,

summarizes it as follows:

1. During the Second Regular Session of 28th Legislature of the State of Arizona, two constitutional amendments, among others, were proposed and referred to the people of the State of Arizona according to law for their acceptance or their rejection. One amendment, House Concurrent Resolution 1, which became Proposition 108 on the General Election Ballot on November 5, 1968, proposed the abolishing of the Constitutional office of State Auditor; the other amendment, Senate Concurrent Resolution 6, which became Proposition 104 on the General Election Ballot, proposed that all constitutional state officers be given four year terms, starting with the term to be voted on in the

fall of 1970. Because of the eventuality that the people might not fully accept the Legislature's efforts at governmental reorganization, appellant, a long time and very popular officeholder in this state, filed and ran in the November election of 1968 for the office she had held for so many years. Both propositions passed, and appellant, running unopposed, received all of the votes cast for State Auditor.

2. After an abortive effort by the appellant to bring this matter before the Arizona Supreme Court prior to the technical completion of all the election processes of 1968, (Jordan v. Williams, unreported, #9465, Arizona Supreme Court, Petition for Writ of Prohibition and Certiorari, denied, November 27, 1968)

a petition for Writ of Quo Warranto was brought by appellee on December 5, 1968, with the results as outlined in Appendices A through E in appellant's jurisdictional statement.

ARGUMENT

NO SUBSTANTIAL FEDERAL QUESTION

Appellant asserts in her jurisdictional statement that the granting by the Arizona Supreme Court of a rehearing on an original proceeding in Quo Warranto before that court denied appellant due process of law under the Fourteenth Amendment of the United States Constitution.

The decision of this Court in Snowden v. Hughes, 321 U.S. 1 (1944), as pointed out by appellant in her jurisdictional statement, answers this allegation "with

a resounding 'No.'" The Snowden case involved an action in the federal courts for damage for infringement of the plaintiff's civil rights in violation of the Fourteenth Amendment. Plaintiff was one of several candidates for nomination for representative in the Illinois General Assembly. Although plaintiff received sufficient votes in the primary election for nomination, the Canvassing Board wrongfully refused to certify his name as required by state law. The United States Supreme Court sustained the dismissal of the action, stating at p. 7:

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. Taylor & Marshall v.

Beckham, 178 U.S. 548. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, Cave v. Newell, 246 U.S. 650, as we reaffirm now."

The Court in Snowden also cited with approval Wilson v. North Carolina, 169 U.S. 586 (1898), pp. 594-5:

"In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and the terms upon which it shall be held by the person filling the office. . . .

"Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without

> due process of law or by denying him the equal protection of the laws."

See also Taylor v. Beckham, 178 U.S. 548 (1900); Elder v. Colorado, 204 U.S. 85 (1907).

The Snowden case has been consistently followed by this Court and by other courts. See, e.g., Egan v. City of Aurora, et al., 365 U.S. 514 (1961) (Per Curiam); Borne v. Jones, 147 F.2d 1008 (5th Cir., 1945) (Per Curiam); Byrd v. Sexton, 277 F.2d 418 (8th Cir., 1960); Bynum v. Burns, 379 F.2d 229 (8th Cir., 1967); Application of Wyckoff, 196 F.Supp. 515 (S.D. Miss., 1961); Bacon v. Holzman, 264 F. Supp. 120 (N.D.Ill., 1967); Gentry v. Howard, 288 F.Supp. 495 (E.D. Tenn., 1968); Coffelt v. Bryant, 238 Ark. 363, 381

S.W.2d 731 (1964).

Appellant argues that Baker v. Carr, 369 U.S. 186 (1962) "conflicts" with Snowden and indicates that the United States Supreme Court would have jurisdiction over "political areas", including this one. Baker v. Carr is clearly distinguishable. The Court there found that an equal protection clause challenge to state legislative apportionment presented no political question. Ibid., 369 U.S. at pp. 209, 217. The Court in Baker cites Snowden in support of the proposition that if discrimination is properly shown, the right to relief under the equal protection clause is not diminished by fact that the discrimination relates to political rights. Ibid., 369 U.S. at p. 210. Thus, even conceding that

certain "political questions" are justiciable, Snowden nevertheless stands for the proposition that even an unlawful denial by state action of a right to state political office is not a denial of a right secured by the due process clause of the Fourteenth Amendment. Thus, even if the Arizona Supreme Court wrongfully allowed the motion for rehearing (which action appellee asserts was valid and proper in all respects), Snowden precludes the finding of a substantial federal question.

Quite apart from the Snowden doctrine, this Court has held that the determination by a state court of its conception of the rules of pleading, as expounded in previous decisions of the state court, does not involve a federal question. Delmar Jockey

Club v. Missouri, 210 U.S. 324 (1908). The Supreme Court there dismissed a writ of error from the forfeiture in the state court of a corporate franchise by quo warranto proceedings, and held that the asserted federal questions were so devoid of merit as to constitute no basis for the writ of error even if the state court had erred in its conclusions.

A decision by the state court on a matter of local pleading or practice is ordinarily given conclusive effect. John v. Paullin, 231 U.S. 583 (1913); United Gas Public Service Co. v. Texas, 303 U.S. 123 (1938). In the instant case, appellant is challenging the ruling of the Arizona Supreme Court, based on its own prior decisions, that it has in-

herent power to grant a rehearing on cases it has heard under its original jurisdiction of extraordinary writs, which is purely a matter of local pleading or practice.

POTENTIAL FEDERAL QUESTIONS NOT TIMELY RAISED

The attempt to raise the alleged federal question was so much of an afterthought that it must have been based upon some novel theory that a litigant need not raise allegedly federal questions, in spite of the opportunity to do so, until it becomes apparent, either by hunch or more reliable information, that he may lose on the theories he had theretofore advanced. (See Appendices D and E of appellant's jurisdictional statement.)

Such is now the law, and the attempt to raise the alleged federal question is clearly not timely. Henry v. Mississippi, 379 U.S. 443 (1965); Hanson v. Denckla, 357 U.S. 235 (1958).

STATE COURT DECISION RESTED ON ADEQUATE STATE GROUNDS

Even if a federal question had been properly raised and determined in the Arizona Supreme Court, this Court will not take jurisdiction when the determination of the cause below rested on adequate state grounds. Murdock v. Memphis, 87 U.S. 590 (1874); Klinger v. Missouri, 80 U.S. 257 (1871); Neilson v. Lagow, 53 U.S. 98 (1851).

Thus, in Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945), the Court said:

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of Federal laws, our review could amount to nothing more than an advisory opinion. . . ."

Ultimately, the decision of the Arizona Supreme Court rested upon construction of two amendments to the Constitution of the State of Arizona. That

determination is binding upon this Court as a final expression of the state's court of last resort on a matter of purely state law. Garner v. Louisiana, 368 U.S. 157 (1961). Thus, no matter what this Court may feel about the propriety of the practice of the Supreme Court of Arizona with respect to entertaining motions for rehearing, the ultimate decision of that court rested upon independent, separate grounds of purely state law.

Appellant asserts on page 2 of her jurisdictional statement that:

> "The state statute involved is a rule of the Supreme Court of Arizona granting rehearing on an original writ of Quo Warranto, enunciated for the first time in the judgment on rehearing of February 6, 1969, which rehearing was allowed in the absence of any

constitutional or statutory authority, or prior enunciated rule."

The granting by the Arizona Supreme Court of appellee's motion for rehearing did not enunciate a new rule of law for the first time. Rather, it was done pursuant to the "inherent power of the court to correct its judgments". (State ex rel. Nelson v. Jordan, supra, 450 P.2d at p. 384). The power of the Arizona Supreme Court to grant motions for rehearing in cases of original jurisdiction of petitions for extraordianry writs had been previously established in several other cases before that court. Bushnell v. Superior Court of Maricopa County, 102 Ariz. 309, 428 P.2d 987 (1967), on rehearing 102 Ariz. 465, 433 P.2d 15; State v. Superior Court of Mari-

copa County, 93 Ariz. 149, 379 P.2d 133 (1963), on rehearing 93 Ariz. 351, 380 P.2d 1009 (1963); Lane v. Mathews, 73 Ariz. 435, 242 P.2d 557 (1952), on rehearing 74 Ariz. 201, 245 P.2d 1025 (1952), on second rehearing 75 Ariz. 1, 251 P.2d 303 (1952). See also, Arizona Com.Min.Co. v. Iron Cap C. Co., 29 Ariz. 23, 239 Pac. 290 (1925).

It is really unquestioned, and hopefully unquestionable, that a court which renders a decision in the first instance should have and does have, either inherently, or most generally by Constitution, statute and/or court rule, the first right to review, reconsider, and revise, if necessary, that decision. The salutary effect of such a rule of law, both upon

the courts and the litigants, has been so obvious that there is a dearth of cases calling it into question or review.

The clearest explanation of the inherent power, prior to the case at bar, is found in Lindus v. Northern Insurance Company of New York, 103 Ariz. 160, 438 P.2d 311 (1968), and is clearly binding upon this Court, as the Arizona Court's interpretation of Arizona law. Garner v. Louisiana, supra.

> "It would be absurd to argue that a court, empowered to correct errors in every other court in this state cannot correct its own. Ariz. Const. Art. 6, Sec. 5, A.R.S. To hold otherwise would create the astounding concept that mistakes by the Supreme Court of Arizona are the only errors for which no relief is available." Lindus v. Northern Insurance Company of New York, supra, 103 Ariz. at p. 162, 438 P.2d at p. 313 (1968).

While a response to the point is not necessary, counsel here, as well as the dissenting justices, make much of the fact that the Arizona Attorney General's Office once urged the Arizona Court to adopt a contrary position on rehearing in State v. Bohannon, 101 Ariz. 520, 421 P.2d 877 (1967), appeal dismissed, 389 U.S. 1 (1967). (See appellant's jurisdictional statement, p. 22; State ex rel. Nelson v. Jordan, supra, 450 P.2d at p. 388 (1969)) So far as can be determined, only the legendary Perry Mason has been totally omniscient and never taken a position with which a court subsequently disagreed. This office makes no claim of infallibility. The position on rehearing urged by this office in Bohannon, supra, was not adopted

by the Arizona Supreme Court in that case. The Court there denied the motion for rehearing on the merits. The Court did not summarily dismiss the motion on jurisdictional grounds as urged by this office. This matter of Arizona pleading and practice is clearly well settled.

CONCLUSION

On any, or all, of the grounds urged in the Motion to Dismiss the Appeal in this cause, the appeal should be dismissed.

DATED this 5th day of August, 1969.

Respectfully submitted,

GARY K. NELSON
Attorney General of Arizona
Attorney for Appellee

CERTIFICATE OF SERVICE

I, GARY K. NELSON, attorney for the appellee herein and a member of the bar of this Court, do hereby certify that service was made on appellant herein by mailing three copies of the attached motion and brief, in accordance with Rule 33, Rules of the Supreme Court, 28 U.S.C., to:

R. G. Langmade
4802 East Van Buren Street
Phoenix, Arizona 85008

and

Stewart L. Udall
1169 Crest Lane
McLean, Virginia 22101

DATED this 15th day of August, 1969.

GARY K. NELSON